Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, AND THE HONORABLE NATHANIEL R. JONES, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THE HONORABLE ANTHONY J. CELEBREZZE, SR., SENIOR JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND THE HONORABLE DAVID D. DOWD, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

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QUESTIONS PRESENTED

Whether the District Court exceeded the scope of this Court's remand in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), when, following such remand, it (1) directed the parties to address an issue other than Plaintiffs-Respondents' "one person, one vote" claim under the Fourteenth Amendment, and (2) granted Plaintiffs-Respondents' Motion to File a Second Amended Complaint.

Whether granting the Petition for a Writ of Mandamus is in aid of this Court's appellate jurisdiction and is warranted by exceptional circumstances, and whether this is the only court which can grant adequate relief.

LISTING OF ADDITIONAL PARTIES

Petitioners

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Secretary to the Apportioning Persons.

Respondents

NATHANIEL R. JONES, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Sitting as United States District Judge for the Northern District of Ohio by appointment pursuant to 28 U.S.C. § 2284, ANTHONY J. CELEBREZZE, SR., Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, Sitting as United States District Judge for the Northern District of Ohio by appointment pursuant to 28 U.S.C. § 2284, DAVID D. DOWD, JR., United States District Judge for the Northern District of Ohio, BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, PAUL MECHLING, RONALD GERBERRY, Representative of the 65th Ohio House District, MARY ABEL, Representative of the 78th Ohio House District, and WILLIAM MALLORY, Representative of the 31st Ohio House District and Majority Floor Leader.

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No. ———

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Pursuant to 28 U.S.C. § 1651(a), Petitioners George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and James R. Tilling, Secretary to the Apportioning Persons (collectively, "Petitioners"), respectfully petition this Court to issue a writ of mandamus to require the United States District Court for the Northern District of Ohio to comply with the mandate of this Court issued in the case of *Voinovich v. Quilter*, October Term, 1992, on March 2, 1993,

and to confine its proceedings on remand to Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion.

This petition meets each requirement for this Court's issuance of a writ of mandamus. Supreme Court Rule 20.1. First, there is a clear basis for the exercise of this Court's discretionary authority in aid of its appellate jurisdiction because the District Court disregarded the mandate of this Court.

Second, adequate relief cannot be obtained in any form from any other court because there is no opportunity for immediate appellate review of the District Court's decision. The District Court's Opinion and Order of March 31, 1994, is neither a final order nor an appealable collateral order.

Third, the District Court's Opinion and Order of March 31, 1994, will cause extraordinary hardship, not only for the Petitioners, but also for Members of and candidates for the Ohio General Assembly, as well as the entire electorate of the State, as the decision allows a cloud to continue to hang over Ohio's legislature, its electoral process, and its state legislative districts. The District Court, by granting Plaintiffs-Respondents' motion for leave to file a second amended complaint in order to attempt to state a claim under this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), not only exceeded the scope of this Court's mandate, but also once again cast doubt upon the validity of Ohio's state legislative districts. Plaintiffs commenced this case challenging the validity of the Ohio apportionment plan over two and one-half years ago. They tried the case on three theories, all of which have now been rejected. The District Court, however, has permitted them to begin anew, perpetuating the uncertainty surrounding the State's legislative districts well into the mid-1990's.

Finally, as pointed out by Judge Dowd in his dissent to the District Court's March 31, 1994, Opinion and Order,

the extraordinary hardship connected with further prolonging this case cannot be justified given the clearly frivolous nature of the Plaintiffs-Respondents' new theory. Thus, the extraordinary relief sought in this Petition is essential in order to bring this lengthy and comprehensive challenge [1] to Ohio's plan of apportionment to a close.

OPINIONS BELOW

The December 22, 1993, Order of the three-judge court has not been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91-CV-2219, and is set out in the Appendix hereto at App. p. 1a.

The March 31, 1994, Opinions and Orders of the three-judge court have not been officially reported. They were filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91-CV-2219, and are set out in the Appendix hereto at App. p. 4a and p. 20a.

The following are the District Court's opinions and orders prior to this Court's decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993):

The January 31, 1992, Opinion and Order of the three-judge court has been officially reported at 794 F.Supp. 695. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case

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[1] Plaintiffs, either in this case or in the case before the Ohio Supreme Court, *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), challenged the Ohio apportionment plan on numerous grounds: (1) that it violated Article XI §§ 3, 4 & 7, of the Ohio Constitution; (2) that it violated the Fifteenth Amendment to the United States Constitution because it was the result of intentional racial discrimination; (3) that it violated § 2 of the Voting Rights Act; and (4) that it violated the Equal Protection Clause of the Fourteenth Amendment because it constituted (a) a racial gerrymander, (b) a political gerrymander, and (c) a gender-based gerrymander. None of these claims has been successful.

number 5:91-CV-2219. "Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is officially reported at 794 F.Supp. 715.

The March 10, 1992, Order of the three-judge court has been officially reported at 794 F.Supp. 756.

The March 19, 1992, Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not been officially reported. It was set out in the Appendix to Jurisdictional Statement in *Voinovich v. Quilter*, No. 91-1618, at 127a.

The March 31, 1992, Order of the three-judge district court has been officially reported at 794 F.Supp. 760.

The May 5, 1992, Order of the three-judge district court has been officially reported at 794 F.Supp. 760.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651 in aid of its appellate jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of constitutional, statutory, and other provisions involved in this case is set out in the Appendix hereto at App. 39a.

STATEMENT OF FACTS

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board convenes every ten years in the year following the decennial census. The 1991 Apportionment Board, consisting of Petitioners Voinovich, Taft and Aronoff and Respondents Ferguson and Quilter, convened on August 22, 1991. D. 147, Ex. A at 1-2. The Board adopted a plan of apportionment for Ohio's General Assembly on October 1, 1991. D. 154, Ex. 16 at 31-32. The Board reconvened on October 3, 1991, to

make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14.

On November 1, 1991, Plaintiffs-Respondents commenced an action in the District Court alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D.1. On January 31, 1992, the District Court issued its Opinion and Order, declaring that the plan of apportionment violated § 2 of the Voting Rights Act, because the Board had failed to justify its construction of minority controlled districts. *Quilter v. Voinovich*, 794 F.Supp. 695 (N.D. Ohio 1992). The District Court expressly abstained on the Ohio Constitutional issues, noting that these issues were then pending before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). 794 F.Supp. at 701-02. The Court remanded the plan to the Apportionment Board with an order to justify the minority controlled districts contained in the plan.

On February 14, 1992, the Ohio Supreme Court issued its decision upholding the plan against state constitutional attacks. *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). A majority of the members of the Court directed the Board to make technical corrections to the plan. 63 Ohio St. 3d at 202, 205, 214.

On February 18, 1992, the Board made the technical corrections to the plan as directed by the Ohio Supreme Court. D. 147, Ex. C at 59; D. 147, Ex. A at 107. For the most part, these technical corrections involved reuniting split political subdivisions, D. 192; *Quilter v. Voinovich*, 794 F.Supp. 760, 763 (N.D. Ohio 1992), and the plan, as amended, was labeled as "Amendment D." D. 147, Ex. A. at 107. Also, on February 18, 1992, the Apportionment Board adopted "Findings and Conclusions," which, in the view of a majority of the Board,

"justified" the Board's creation of minority controlled districts under both the original plan and "Amendment D." D. 147 Ex. A.

On March 10, 1992, the District Court ruled that the Board once again had failed to justify its creation of five minority controlled house districts and, therefore, ruled that the plan violated both § 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, 794 F.Supp. 756 (N.D. Ohio 1992).

On March 11, 1992, Petitioners appealed the District Court's order to this Court, D. 164, which, on April 20, 1992, issued a stay of the District Court's orders. *Voinovich v. Quilter*, 112 S.Ct. 1663 (1992). On March 19, 1992, in response to Petitioners' Motion to Stay its March 10, 1992, Order Pending Appeal, the District Court also concluded that four districts under the plan violated the "one person, one vote" requirement of the Fourteenth Amendment to the United States Constitution. D. 173.[2]

On March 2, 1993, this Court reversed the decision of the District Court that the plan violated § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). The Court remanded the case to the District Court "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment," 113 S.Ct. at 1154 (emphasis added), and specifically directed the District Court to address one question:

> Here the District Court found that the maximum total deviation from ideal district size exceeded 10%. As a result, [plaintiffs] established a *prima facie* case of discrimination, and [defendants] were required to

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[2] Petitioners also noticed their appeal from the District Court's March 19, 1992, and March 31, 1992, Orders. D. 174; D. 178.

> justify the deviation. [Defendants] attempted to do just that, arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries. The District Court therefore was required to decide *whether the "plan 'may reasonably be said to advance [the] rational state policy' " of preserving county boundaries "and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of th[e] plan exceed constitutional limits.' "*

113 S.Ct. at 1159 (citations omitted) (emphasis added).

Through a leter from the clerk dated April 30, 1993, the District Court:

> requested briefs from the parties addressing whether the reapportionment plan at issue is violative of the Fourteenth Amendment and whether the deviations from the ideal district size are justified using the analysis employed in *Brown v. Thomson*, 462 U.S. 835 (1993) and *Mahan v. Howell*, 410 U.S. 315 (1973).

D. 222. Both parties filed briefs on remand on June 30, 1993.

By Order dated October 19, 1993, the Court directed Plaintiffs to respond to Defendants' brief on remand and permitted Defendants to file a reply thereto. D. 236.[3] On November 16, 1993, Plaintiffs Ferguson and Quilter filed a "Statement of Counsel" indicating that they intended to make no additional comments on remand. D. 238.

Plaintiff-Respondent Mallory, Representative of the 31st Ohio House District and the Majority Floor Leader, on the other hand, filed a brief in which he again asserted that the plan was violative of § 2 of the Voting Rights

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[3] Judge Peck, a member of the three-judge court in this case, died on September 7, 1993. Respondent Judge Celebrezze, Senior Judge of the Court of Appeals for the Sixth Circuit, thereafter began serving as a member of the District Court panel.

Act, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 239. With regard to the Fourteenth Amendment, Plaintiff Mallory suggested that the plan of apportionment was invalid under this Court's recent decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993). Defendants replied on November 29, 1993, and advised both Plaintiffs and the District Court that the "*Shaw* issue" was not within the scope of this Court's remand of this case. D. 240.

Nevertheless, on December 22, 1993, the District Court filed an order which stated, in pertinent part:

> The Supreme Court remanded an issue in this case relating to the Court's finding that the maximum total deviation from the ideal district size exceeded 10% and stated:
>
> > On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra*, at 843-846, and *Mahan, supra*, at 325-330.
>
> The Court requests that the parties supplement their briefs on the remand issue and comment on the application of the subsequent decision of the Supreme Court in *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993).

D. 242 at 1; App. at 1a.

On January 14, 1994, Plaintiffs and Defendants filed their "Supplemental Briefs." D. 245 & 247. Defendants once again expressed their view that consideration of this issue was beyond the scope of this Court's remand. Plaintiffs, in response to the apparent invitation extended by the District Court in its December 22, 1993, Order, filed both a Supplemental Brief, D. 245, and a motion to file a second amended complaint to state a claim under *Shaw*. D. 246. Defendants filed a memorandum in opposition to the motion in which they asserted that allowance of

such an amendment would exceed the scope of this Court's remand and would constitute a serious abuse of discretion. D. 251.

The District Court heard oral arguments on February 9, 1994, during which Plaintiffs not only asked for permission to submit additional evidence on the "*Shaw* issue," but also on their claims that the plan violated § 2 of the Voting Rights Act and Article XI of the Ohio Constitution. D. 261 at 4-5, 8-11. Counsel for Defendants again advised that the remand of this case was "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added). D. 261 at 43.

On March 31, 1994, the District Court issued two Opinions and Orders. In the first one, the three-judge court unanimously ruled:

> that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the defendants have advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthers the rational state policy; and (3) the 13.81% and 10.54% total deviations fall within constitutional limits. Accordingly, we enter judgment for the defendants on this issue.

Quilter v. Voinovich, I, No. 5:91-CV-2219, App. at 19a (N.D. Ohio March 31, 1994). Thus, the District Court resolved the sole issue remanded to it by this Court.

In the second Opinion and Order, however, the District Court, in a two-to-one decision, exceeded the scope of this Court's remand by granting Plaintiffs' motion to file a second amended complaint in order to attempt to state a claim under *Shaw v. Reno*. The District Court brushed aside this Court's mandate limiting the scope of

the issues to be considered by the district court on remand:

> The defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. Id. at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. *Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.*

Quilter v. Voinovich, II, No. 5:91-CV-2219, App. at 24a. (N.D. Ohio March 31, 1994) (emphasis added).[4]

Because the District Court's actions clearly exceed the scope of this Court's March 2, 1993, remand of this case, and relief is available from no other source, Defendants have filed this Petition for a Writ of Mandamus.

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[4] The District Court, being acutely aware of its departure from the limited scope of this Court's remand, attempted to obscure its departure by offering several justifications for granting the motion to amend. These justifications are, on their face, blatantly inconsistent. For example, the District Court majority stated that "[t]he issues thus tried [in this case] included those implicated in *Shaw*," and that "plaintiffs' [original] claims [were] . . . closely related to the racial gerrymandering concerns in *Shaw* . . . ." App. at 22a. Yet, the District Court later indicated that because the "*Shaw* issue" now advanced by Plaintiffs is fundamentally different from the issues previously raised, its consideration is not foreclosed by this Court's mandate. App. at 23a-24a.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF PETITIONERS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S. Ct. 1149 (1993), AND PETITIONERS ARE, THEREFORE, ENTITLED TO A WRIT OF MANDAMUS.

The District Court exceeded the scope of this Court's remand of this case following the decision in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). This Court expressly remanded the case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." 113 S.Ct. at 1154 (emphasis added). Despite this clear limitation, the District Court has, in effect, ignored the mandate of this Court and reopened the entire case, leaving in question the validity of the Ohio General Assembly districts well into the mid-1990's. This Court's prompt correction of the lower court's error is required in order to bring this already prolonged litigation to a close.

"[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948). See also *Stanton v. Stanton*, 429 U.S. 501, 502, 504 (1977) ("On remand, the Utah Supreme Court did not consider the issue presented to it and held, instead, that the age-of-majority statute was constitutional as applied to females without considering the discrimination. That action does not comply with our mandate. * * * Accordingly, the judgment of the Utah Supreme Court is vacated, and the case once again is remanded for further proceedings not inconsistent with this opinion.") (footnote omitted); *Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967).

Indeed, this Court has long held that "[w]hen a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either

upon a new appeal *or by writ of mandamus.*" *Baltimore & Ohio R. Co. v. United States,* 279 U.S. 781, 785 (1929) (emphasis added) (citations omitted). See also *Vendo Co. v. Lektro-Vend Corp.,* 434 U.S. 425, 427-28 (1978) (*per curiam*) ("We believe that the parties are correct in treating this as an action for mandamus, which is available to a party who has prevailed in this Court if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . .' * * * If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court.") (citations omitted); *General Atomic Co. v. Felter,* 436 U.S. 493, 497 (1978) (*per curiam*); *Will v. United States,* 389 U.S. 90, 95-96 (1967) (Mandamus is appropriate "where it is necessary to confine a lower court to the terms of an appellate tribunal's mandate.") (citations omitted).

In *United States v. Haley,* 358 U.S. 644 (1959), this Court reversed the district court, leaving only one issue for that court's consideration on remand. The district court, however, went beyond the scope of the Court's remand and adjudicated other issues. On consideration of a motion for leave to file a writ of mandamus, this Court concluded that "[t]he District Court's error should be rectified without delay, and we think that the proper means for accomplishing this is by mandamus." *United States v. Haley,* 371 U.S. 18, 20 (1962) (*per curiam*) (citations omitted). See also *Gaines v. Caldwell,* 148 U.S. 228, 238 (1893) ("[W]e are of the opinion that it is proper for this court, on application for a writ of mandamus, to construe its own mandate in connection with its opinion; and if it finds that the circuit court has erred, or acted beyond its province, in construing the mandate and

opinion, to correct the mistake now and here, and to do so by a writ of mandamus.").[5]

The District Court in this case attempts to justify its reopening of this case by reasoning that because *Shaw v. Reno* was decided after the Court issued its decision in

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[5] The District Court majority attempted to distinguish this Court's decision in *Briggs* and its progeny by citing numerous cases which generally hold that "[w]hile a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." App. at 23a (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979)). These cases are inapposite to the issue now before this Court, *i.e.*, the District Court's *disregard* of this Court's mandate. For example, the Court in *Quern* merely concluded that the law of the case doctrine did not foreclose the lower court's consideration of issues left open by this Court's mandate. The mandate at issue therein had remanded the case "for further proceedings consistent with this opinion." 440 U.S. at 347 n.18. In *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), also cited by the District Court, this Court merely held that its earlier mandate did not bar the lower court's consideration of "subsidiary" or "supplemental" issues such as attorneys fees. In *Jones v. Lewis*, 957 F.2d 260 (6th Cir.), *cert. denied*, 113 S.Ct. 125 (1992), the court concluded that its earlier mandate did not bar consideration of an issue because "this court made no determinations on the merits of [appellant's] case . . . ." 957 F.2d at 262.

None of the cases cited by the District Court majority addressed a situation similar to the situation in this case, *i.e.*, where all of the plaintiffs' claims have been resolved in favor of the defendants, and upon a limited remand from an appellate court, the plaintiffs attempt to circumvent the appellate court's decision by simply asserting a new theory of recovery. Indeed, two of the decisions cited by the District Court majority support *Petitioners'* arguments herein. In *Hester v. International Union of Operating Eng'rs*, 941 F.2d 1574 (11th Cir. 1991), the Eleventh Circuit affirmed the district court's denial of a motion designed to amend the complaint on remand in order to "resurrect" a claim previously resolved against the plaintiff. 941 F.2d at 1578. And, in *Rutherford v. United States*, 806 F.2d 1455 (10th Cir. 1986), the Tenth Circuit stated that "[t]he lower court has no discretion if the appellate court mandate either calls for or precludes amendment [of the complaint] or *if amendment would run counter to the appellate court mandate.*" 806 F.2d at 1460 (emphasis added).

this case, the Ohio reapportionment plan must be evaluated in light of *Shaw*:

> [T]he contours of the cause of action established in *Shaw* were unclear until the issuance of the opinion in that case, so it is unfair for us to have expected the plaintiffs to have specifically articulated the issue earlier. Due to the closeness of the issues, we feel that the fact that *Shaw* had not yet been decided is the only reasonable explanation for why the plaintiffs did not make the specific claim previously. As just one example, the Plaintiffs' Proposed Findings of Fact, submitted prior to our earlier decision, contains a fourteen-page argument under the heading, "1991 Plan Violates Ohio Constitution as a Result of Race Conscious Gerrymandering." R. —— at 114-28. We must assume that the plaintiffs would have alleged racial gerrymandering in violation of the Fourteenth Amendment as well, had such a cause of action been recognized.

Quilter v. Voinovich, II, No. 5:91-CV-2219, App. at 25a-26a (N.D. Ohio March 31, 1994).[6]

It is well established, however, that this Court's mandate is unaffected by its subsequent decisions:

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[6] Contrary to the District Court's assertion, Plaintiffs-Respondents had previously advanced the argument that the Petitioners engaged in racial gerrymandering in violation of the Fourteenth Amendment. They did so in the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), wherein they asserted that alleged racial gerrymandering by Petitioners (Plaintiffs in that case) prevented the issuance of a declaratory order upholding the plan. *Defendants Ferguson and Quilter's Prehearing Brief* at 17 ("The Plaintiffs' unlawful, racially conscious activity described above in drawing and adopting the 1991 apportionment plan violates the Equal Protection Clause of the Fourteenth Amendment."). For one reason or another, they chose not to advance that particular theory in this case until invited to do so by the District Court in its December 22, 1993 Order. A copy of the relevant portions of Plaintiffs-Respondents' *Prehearing Brief* filed in the Ohio Supreme Court is included in the Appendix hereto at p. 36a.

> As to the suggestions that the views adopted by this court in its decision in *McDonald v. Belding*, 145 U.S. 492, 12 S.Ct.Rep. 892, (decided by this court after the present cases were decided,) would, if applied to the present cases, have caused a different result in them, we are of opinion that, without conceding that such would have been the result, this court cannot, on well-established rules and principles, permit the circuit court, of its own motion, to go back of, or subvert, what was settled by the opinion and mandate in the present cases.

Gaines, 148 U.S. at 244.

Indeed, this Court was unquestionably aware of the issue raised in *Shaw v. Reno* when it issued the decision in this case. Nevertheless, the Court did not remand this case for consideration of the issue raised in *Shaw*.[7] Rather, it remanded this case "*only* for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment." *Voinovich v. Quilter*, 113 S.Ct. at 1154 (emphasis added). This Court did not remand the case to consider *all* potential Fourteenth Amendment claims. It remanded

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[7] This Court noted probable jurisdiction in *Shaw* on December 7, 1992, the day prior to the oral argument in this case. *Shaw v. Barr*, 113 S.Ct. 653, 121 L.Ed.2d 580 (1992). In its order noting probable jurisdiction in *Shaw*, the Court limited the issue for its consideration:

> Dec. 7, 1992. In this case probable jurisdiction is noted. Argument shall be limited to the following question, which all parties are directed to brief: "Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own."

113 S.Ct. at 653-54. Moreover, the pendency of *Shaw* was referred to by the Solicitor General at oral argument in the present case. Trans. of Oral Argument at 17.

for consideration of one claim, the "equal population [one person, one vote] claim."

Moreover, this Court noted in its unanimous opinion in this case that the "*Shaw* issue," *i.e.*, the validity of race-based redistricting under the Fourteenth Amendment, had not heretofore been raised in this case:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here.

Voinovich v. Quilter, 113 S.Ct. at 1157. Racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment simply was not, and is not, an issue in this case. Consequently, it was entirely inappropriate for the District Court to go beyond the scope of this Court's remand by granting Plaintiffs' motion to file a second amended complaint to state a new claim in this case.

Judge Dowd correctly noted in his dissent to the District Court's Opinion and Order granting leave to file a second amended complaint that "the recent decision of *Shaw v. Reno*, 113 S.Ct. 2816 (1993)[,] dealing with Congressional redistricting for the State of North Carolina[,] is anchored in a factual situation strikingly dissimilar to the reapportionment of Ohio for its General Assembly." App. at 27a. See also Pildes & Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich.L.Rev. 483, 496-99 (1993) (distinguishing in detail *Voinovich and Shaw*).[8] Had this Court believed that the *Shaw* issue was somehow germane to this case, it could

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[8] One of this article's authors, Professor Richard H. Pildes of the University of Michigan Law School, served as a consultant to the Special Master appointed by the District Court in this case. 92 Mich.L.Rev. at 496 n.63; D. 271.

have addressed the issue in its opinion, or held this case for *Shaw* and then remanded for reconsideration in light of *Shaw*. This Court did neither, but rather remanded this case for consideration of a single issue.[9]

Ordinarily, the amendment of pleadings is a matter within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). An abuse of discretion is manifest when the District Court grants a motion to amend a complaint late in the proceedings. *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2889 (1991).

Following trial of the case, " 'a complaint cannot be amended . . . where the amendment raises issues not within the theory on which the case was tried.' " *Worley v. Columbia Gas of Ky., Inc.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974). See also *Lynch v. Dukakis*, 719 F.2d 504, 508-09 (1st Cir. 1983) ("Therefore, an amendment after judgment is not permissible if it brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is some evidence in the record—introduced as relevant to some other issue—that would support the amendment."); *United States, ex rel. Townsend v. Ogilvie*, 360 F.2d 925 (7th Cir.) (following remand of the case, district court properly denied motion to amend the pleading "to set forth grounds not theretofore presented" because to do so would deviate from the court of appeal's mandate), *cert. denied*, 385 U.S. 938 (1966); *Equitable Life Assurance Soc'y v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779 (8th Cir.) (fol-

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[9] Indeed, this Court in *Shaw* itself gave a clear indication of how it could have left the issue open for the District Court's consideration in this case had it chosen to do so. In *Shaw*, the Court stated that certain arguments "were not developed below, and the issues remain open for consideration on remand." 113 S.Ct. at 2831. In contrast, the Court explicitly remanded this case for the consideration of a single issue.

lowing remand, district court properly denied motion to amend pleading where the "case had been remanded 'for limited purposes' only"), *cert. denied*, 329 U.S. 760 (1946); *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 662 (7th Cir. 1978) (amendments to pleadings following remand are generally not allowed because to do so would, in effect, permit interlocutory appeals), *cert. denied*, 439 U.S. 1135 (1979).[10] The District Court's allowance of Plaintiffs' amendment in this case goes beyond a mere abuse of discretion. Rather, such allowance is a

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[10] In *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973), *cert. denied*, 416 U.S. 939 (1974), the Sixth Circuit affirmed the district court's denial of a motion to amend the complaint following its remand of the case from an earlier appeal:

> [Plaintiff] has moved to amend its pleadings to assert an alternative theory of recovery . . . . * * * The only excuse offered for this delayed presentation is that [plaintiff] misconceived the law. * * *
>
> A misconception of the law is not an excuse for the late presentation of an alternative theory of recovery. No reason is shown why [plaintiff] could not have presented its alternative theory initially. * * * A losing party can always argue in retrospect that he misconceived the law. * * *
>
> As pointed out by the Supreme Court . . . , a trial court is required to take into account any prejudice that the party opposing the motion to amend would suffer. Here the prejudice to [defendant] is obvious. The case has been pending for more than two and one-half years, and [defendant] already has had to defend against one theory at both the district court and the appellate court levels. The District Court would have been justified in concluding that to put [defendant] through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial.
>
> * * *
>
> *Here [plaintiff] proceeded under one theory through the Court of Appeals where it lost. Now it wants to repeat the whole cycle again. We are unwilling to reverse the decision of the District Court. The time has come to bring this extended litigation to an end.*

Troxel Mfg. Co., 489 F.2d at 970-71 (citations omitted) (emphasis added).

complete disregard of this Court's March 2, 1993, mandate.

In the case at bar, Plaintiffs were given every opportunity to formulate and litigate their claims. This Court addressed each of those claims, and left one, and only one, issue for the District Court to decide on remand. The District Court should not permit the Plaintiffs at this late stage of this litigation—some twenty-nine months after this litigation began, more than thirteen months after this Court's decision in this case, and nine months after this Court's decision in *Shaw*—to retry this case on a new and distinct claim. The District Court, contrary to the mandate of this Court, has permitted Plaintiffs to change the theory upon which their case was tried and reviewed by this Court.[11]

Indeed, the retrial of this case apparently involves reopening Ohio Constitutional issues as Plaintiffs premised their motion to amend, in part, upon alleged violations of the Ohio Constitution.[12] Those issues were presented to

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[11] As noted at page 16, *supra*, this Court expressly stated:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here.

Voinovich v. Quilter, 113 S.Ct. at 1157.

[12] At the February 9, 1994, hearing, Petitioners advised the Court that the alleged constitutional errors identified by the Plaintiffs-Respondents were contained in "Amendment C" or the "1991 plan." Both the District Court and this Court noted that those errors were corrected with the adoption of "Amendment D" or the "1992 plan" on February 18, 1992, as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See *Quilter v. Voinovich*, 794 F.Supp. 760, 763 ("The 1991 Plan ['Amendment C'], however, contained several serious errors and omissions as detailed in a thirteen page submission from the defendants. * * * These deficiencies were corrected in the 1992 Plan ['Amendment D']."). *Voinovich v. Quilter*, 113 S.Ct. at 1148 ("The board also adjusted the plan to correct 'technical' errors that the Ohio Supreme Court had identified in its independent review of the

the Ohio Supreme Court during its independent review of the apportionment plan, and it directed Defendants to make a series of technical corrections. *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). Furthermore, the District Court earlier abstained on the state constitutional issues in this case. *Quilter v. Voinovich*, 794 F.Supp. 695, 702. The District Court's January 31, 1992, decision to abstain on these issues is consistent with this Court's admonition that "federal judges [are required] to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe v. Emison*, 113 S.Ct. 1075, 1080 (1993). Now the District Court has presumably reopened these long settled issues of state constitutional law by permitting Plaintiffs to amend their complaint.

Not only have Defendants [Petitioners here] been prejudiced by this amendment, *Prather*, 918 F.2d at 1259 ("To force [defendant] to begin to formulate a defense to these [new claims] at this late date would be highly prejudicial."), but 292 candidates who filed petitions to run for seats in the General Assembly prior to the February 17, 1994, deadline, and all the voters of Ohio have been prejudiced by once again leaving in doubt the validity of the plan of apportionment for the General Assembly.[13] This Court should erase that doubt by issuing a writ of mandamus directing the District Court to confine itself to

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plan."). Plantiffs, nevertheless, persisted with their attacks on a nonexistent plan of apportionment, and argued, in effect, that nonexistent constitutional errors were the result of impermissible racial gerrymandering. D. 261 at 8-11.

[13] Two hundred and ninety-two (292) individuals filed nominating petitions as partisan candidates for seats in the 121st Ohio General Assembly with the appropriate county boards of elections prior to the February 17, 1994, filing deadline, and have been certified to the May 3, 1994, primary election ballot. Affidavit of John F. Bender, set forth in Appendix hereto at 41a.

this Court's remand.[14] Because the District Court has resolved the one issue remanded to it by this Court, this Court's writ should further direct the District Court to enter final judgment in favor of the Defendants-Petitioners.

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[14] Although Plaintiffs acknowledged that their first amended complaint did not state a claim for racial gerrymandering under the Fourteenth Amendment, D. 246 at 3, they nevertheless asserted that a second amendment is necessary to conform to the evidence in this case. The amendment does not, however, conform to Plaintiffs' prior evidence and theory, but rather is inconsistent therewith. During the trial and appeal of this action, Plaintiffs did not maintain that Defendants impermissibly took race into account in drawing districts for the Ohio General Assembly. Rather, as noted by this Court, they simply asserted that Defendants should have taken race into account towards a different end, because "[i]n [plaintiffs'] view, the plan should have created a larger number of 'influence' districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Voinovich v. Quilter*, 113 S.Ct. at 1153. See also D.48 at 30 ("Mr. Gilliam: Your Honor, I think the answer to that is the board can look to that in drawing districts. The board can certainly look to see what the minorities, where minorities lived and they could look at a totality of circumstances."); D.48 at 99. Plaintiffs' second amended complaint, on the other hand, challenges the mere consideration of race. Under such circumstances, the amendment cannot be said to "conform to the evidence presented at trial."

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to issue a writ of mandamus to the Judges-Respondents directing them to vacate their Opinion and Order of March 31, 1994, granting Plaintiffs' motion to file a second amended complaint, and to confine their proceedings on remand to the Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Because the District Court has now resolved that claim in favor of the Defendants-Petitioners, this Court should further direct the District Court to enter judgment in favor of the Defendants-Petitioners.

Respectfully submitted,

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DATED: April 20, 1994

APPENDIX A

[Filed Dec. 22, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

I. THE REMAND ISSUE

The Supreme Court remanded an issue in this case relating to the Court's finding that the maximum total deviation from the ideal district size exceeded 10% and stated:

> On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra,* at 843-846, and *Mahan, supra,* at 325-330.

The Court requests that the parties supplement their briefs on the remand issue and comment on the application of the subsequent decision of the Supreme Court in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993).

II. THE PENDING APPLICATION FOR FEES OF THE SPECIAL MASTER

Attorney Lawrence Kane, the special master appointed by the Court, has requested an award of fees and the application has been opposed by the Ohio Attorney General. In his opposition the Ohio Attorney General sets forth the legislation of the Ohio General Assembly that provided the mechanism and the funding for the attorneys to represent the state office holders engaged in the reapportionment process. However, the legislation does not provide any insight to the process or the rationale for the fee arrangement that resulted in the hourly rate of $95 that the Attorney General contends should serve as a model for an award of fees to the special master appointed by the Court. The Attorney General is invited to supplement the opposition to the award of fees as requested by the Special Master with an explanation as to how the $95 hourly rate was determined. Additionally, the Special Master claims that his hourly fees were discounted but does not indicate by what amount. He is invited to supplement his request by providing an affidavit regarding the 1992 private billing rates of the persons who worked on the report.

III. THE PENDING APPLICATION OF THOMAS ATKINS FOR AN AWARD OF FEES

The Court is of the view that a factual account of when Mr. Atkins entered the case on behalf of the plaintiff William Mallory may be relevant to the application of Mr. Atkins for an award of fees. Mr. Atkins is invited to supplement his application by supplying an affidavit with regard to the timing of his entry into the case, the scope of his participation, and an account of the times when he appeared before this Court. The parties may also make any additions to their arguments in light of the Supreme Court's reversal.

IV. BRIEFING SCHEDULE

The Court orders that the supplemental briefs requested in Sections I, II and III be filed with the Clerk by January 14, 1994 with copies of the briefs directed to the chambers of the three judges of this Court by 4:00 p.m. on January 14, 1994.

V. THE HEARING

The Court will conduct a hearing on Tuesday, January 25, 1994 at 1:30 PM in the fourth floor courtroom of the United States Court of Appeals for the Sixth Circuit in Cincinnati at which time it will entertain arguments on the remand issue, the application of Lawrence Kane, the special master, for an award of fees and the application of Mr. Atkins for an award of attorney fees.

IT IS SO ORDERED.

For the Court:

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX B

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. The plaintiffs filed this action to challenge the apportionment of Ohio's state legislative districts performed pursuant to 1990 census data. In *Voinovich v. Quilter*, 113 S. Ct. 1149, 1159 (1993), the United States Supreme Court determined that the plaintiffs had established a *prima facie* case that the population disparity among districts violates the Equal Protection Clause of the Fourteenth Amendment. The Court remanded the case to this court, instructing it to determine whether the disparity is justified. After consideration of this issue, we find that the population varia-

tions are justified under established constitutional standards.

I

Pursuant to the Constitution of the State of Ohio, state house districts and state senate districts are drawn by a board of five individuals every ten years.[1] Such a five-member board was established following the 1990 federal census. The majority of the apportionment board[2] appointed Defendant James R. Tilling to draft an apportionment plan on their behalf. After Tilling submitted his plan, the board made various amendments to it, and the plaintiffs in this case challenged the plan that eventually was adopted. On February 18, 1992, in response to the Plaintiffs' constitutional attacks upon the plan, the board made its last changes, resulting in what has been denominated "Amendment D." The plaintiffs maintained their challenge to Amendment D, claiming, *inter alia*, that the populations of some of the districts depart too greatly from the ideal size.

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[1] Article XI, § 1 of the Constitution of the State of Ohio provides:

> The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.
>
> Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representatives districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year [1971] and every tenth year thereafter. . . .

[2] The majority consisted of George V. Voinovich, Governor of the State of Ohio; Stanley J. Aronoff, President of the Ohio Senate; and Robert A. Taft, II, Secretary of State of Ohio. In the minority were Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives, and Thomas E. Ferguson, Auditor of the State of Ohio.

A. *The House Districts at Issue*

After the 1990 census, the ideal Ohio house district included 109,567 individuals.[3] Amendment D designates as house districts seven counties whose population fall within ±10% of the ideal house district size. The populations of four of these counties fall between 95% and 105% of the ideal.[4] The populations of the three others fell between 90%-95% or 105%-110% of the ideal: House District 5 (Ashtabula County—population 99,821, or 91.10% of the ideal district size); House District 6 (Fairfield County—population 103,461, or 94.43% of the ideal district size); and House District 7 (Wayne County—population 101,461, or 92.60% of the ideal district size).

Under Amendment D, the largest district (House District 20—a portion of Cuyahoga County) has a population of 114,943, or 104.91% of the ideal district size. As the majority plan stands then, the total deviation[5] be-

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[3] *See* Ohio Const. art. XI, § 2:

> The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. . . .

According to the 1990 census, Ohio's population was determined to be 10,847,115.

[4] The four counties whose populations fell between 95% and 105% of the ideal district size are: House District 1 (Allen County —population 109,755, or 100.17% of the ideal district size); House District 2 (Warren County—population 113,909, or 103.96% of the ideal district size); House District 3 (Columbiana County—population 108,276, or 98.82% of the ideal district size); and House District 4 (Wood County—population 113,269, or 103.38% of the ideal district size).

[5] As we described *Quilter v. Voinovich*, No. 5:91 CV 2219 (N.D. Ohio Mar. 19, 1992) at n.11:

tween the most populous and least populous state house districts is *13.81%* (or the 104.91% of House District 20 minus the 91.10% of House District 5).

B. *The Senate Districts at Issue*

After the 1990 census, the ideal Ohio senate district included 328,700 individuals.[6] Pursuant to Article XI, Section 11 of the Constitution of the State of Ohio, "[s]enate districts shall be composed of three contiguous house of representatives districts." Under Amendment D, the smallest senate district is Senate District 32—composed of House District 66 (the southwestern quadrant of Trumbull County), House District 67 (the southeastern quadrant of Trumbull County), and House District 68 (Geauga County and the northern half of Trumbull County). Senate District 32 has a population of 308,942, or 93.99% of the ideal district size. The largest is Senate District 1—composed of House District 82 (Williams,

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Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of puls or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yields a total deviation, or "maximum deviation," of 16.5%).

(Emphasis in original.)

An alternative means of making the same calculation, used in the text, is to express the districts' relationship to the ideal district in percentage terms and then subtract the lowest percentage value from the highest one.

[6] *See* Ohio Const. art XI, § 2:

. . . The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Fulton and Defiance Counties), House District 83 (Henry, Pauling, Putnam, and Van Wert Counties), and House District 86 (Hancock and Hardin Counties, and the northeastern quadrant of Auglaize County). Senate District 1 has a population of 343,582 individuals, or 104.53% of the ideal district size. Thus, the total deviation for the senate districts is *10.54.%* (or 104.53% minus 93.99%).

C. *The Court's Remand*

In an unpublished order filed March 19, 1992, we held that the plan's population disparities violated the equal population principles of the United States Constitution. In its opinion, the Supreme Court, *inter alia*, reversed this judgment and held that the plaintiffs had merely stated a *prima facie* case of vote dilution and that the apportionment plan's creators must be given an opportunity to explain whether the deviations are justified. 113 S. Ct. at 1159. Specifically, the Court instructed that we consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown v. Thomson*, 462 U.S. 835, 843-46 (1983), and *Mahan v. Howell*, 410 U.S. 315, 325-330 (1973). 113 S. Ct. at 1159. In the following sections, we fully consider the defendants' justification under *Brown*, *Mahan*, and the Court's other relevant precedents.

II

The Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), established the principle that the Equal Protection Clause prevents the dilution of votes that can occur when citizens are placed in overpopulated state legislative districts.

> We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state ligislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a

> substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 568.[7]

We are to give states "[s]omewhat more flexibility" in their establishment of state legislative districts as opposed to federal congressional districts. *Reynolds*, 377 U.S. at 578; *see also Brown*, 462 U.S. at 850 n.2 (O'Connor, J., concurring) ("The Court has recognized that States enjoy a somewhat greater degree of latitude as to population disparities in a state legislative scheme, which is tested under Equal Protection Clause standards, than in a congressional redistricting scheme, for which the Court has held that Art. I, § 2, of the Constitution provides the governing standard."); *Mahan*, 410 U.S. at 321-22, 327. The Court has given instructions as to the nature and extent of this flexibility in *Mahan*, *Brown*, and its other cases in this area.

Whether a *prima facie* case of a Fourteenth Amendment violation is established depends principally upon the amount of total deviation. Deviations from mathematical equality among state legislative districts are to be considered *de minimis* if the total deviation is between 0% and 10%. Where the deviation is *de minimis*, a plaintiff cannot establish a *prima facie* case of discrimination under the Equal Protection Clause. *Brown*, 462 U.S. at 842-43; *Connor v. Finch*, 431 U.S. 407, 418 (1977); *see generally White v. Regester*, 412 U.S. 755, 763-64 (1973) (state needed to provide no explanation for 9.9% total deviation); *Gaffney v. Cummings*, 412 U.S. 735, 750 (1973) (state needed to provide no explanation for

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[7] At the time *Reynolds* was decided, the Court had already held that Article I, Section 2 of the Constitution requires that congressional districts be subject to an equal population standard. *See Wesberry v. Sanders*, 376 U.S. 1, 6 (1964). *Reynolds* and *Wesberry* both implemented the Court's seminal decision in *Baker v. Carr*, 369 U.S. 186 (1962), which held that districting disputes are justiciable.

7.83% total deviation); *Abate v. Mundt*, 403 U.S. 182, 184-87 (1971) (county explanation required to uphold 11.9% total deviation).

If, as in the instant case, the total deviations exceed 10%, a *prima facie* case of a violation is established and the state is called upon to justify the deviations. Its justification must consist of three components: (1) articulating a "rational state policy" which may justify the deviations; (2) explaining how the apportionment plan "may reasonably be said to advance" the rational state policy; and (3) showing that the deviations resulting from the reasonable pursuit of the rational state policy do not "exceed constitutional limits." *Mahan*, 410 U.S. at 328; *see also Brown*, 462 U.S. at 843.

III

We now consider the components of the justification advanced to explain the population disparity here.

A. *Whether Defendants have asserted a rational state policy.*

The Supreme Court has considered certain purported rational policies to be unacceptable:

> [N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow . . . most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large

> that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Reynolds, 377 U.S. at 579-80. On the other hand, thus far the Court's foremost example of a rational state policy is the preservation of political subdivisions within a state. *See, e.g., Brown*, 462 U.S. at 842-43; *Mahan*, 410 U.S. at 329 ("The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one."); *Reynolds*, 377 U.S. at 580 ("A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions.").

The defendants seek to justify the total deviations in excess of 10% by asserting the rational state policy of preserving county lines, even with respect to those whole-county house districts whose populations depart by more than 5% from the ideal house district size. As described above, the Court expressly has found such a policy to justify deviations from population equality among state legislative districts.

Furthermore, it also appears that the asserted rational state policy has not been advanced disingenuously. The people of the State of Ohio have enacted constitutional provisions reflecting the proffered policy:

> XI § 3 House of representatives districts
>
> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more

> than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.
>
> . . . .
>
> XI § 9 Whole county as district
>
> In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Ohio Const. art. XI, §§ 3, 9; *see also* Ohio Const. art. XI, § 10(B) ("Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district."). The state constitution also manifests a policy of respecting county lines in the formation of senate districts:

> XI § 11 Formation of senate district
>
> . . . A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

Ohio Const. art. XI, § 11.

Ohio's clearly stated policy distinguishes this case from *Chapman v. Meier*, in which the Court rejected North Dakota's political boundary explanation for its plan's

deviations. 420 U.S. 1, 25 (1975) ("It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines.").

We find that the justification the Defendants advance for the total deviations in excess of 10% is appropriate for Equal Protection purposes, and has not been advanced without basis, for there is a state constitutional policy favoring the preservation of county lines when establishing state legislative districts.

B. *Whether the plan reasonably advances the policy.*

The next question is whether Amendment D may reasonably be said to advance this rational state policy. The house districts were formed by following the procedures outlined in the state constitution:

> XI § 10 Creation and numbering of house of representatives districts
>
> The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio *shall* be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio *may* be designated a representative district.

Ohio Const. art. XI, § 10 (emphasis added).

Subsection 10(A) thus mandates the creation of whole county house districts where the counties fall within ±5% of the ideal size; such counties could not in themselves create a total deviation above 10%. Subsection 10(B) permits the apportionment board to create districts out of counties within an additional 5% of the ideal size. We believe that providing this amount of additional latitude for house districts, but no more, is a reasonable manner in which the state may advance its policy.

The Ohio Constitution contains no equivalent provision that permits the creation of senate districts that deviate by more than 5% from the ideal. However, in the state court companion to this lawsuit, the Ohio Supreme Court directly upheld the creation of Senate District 32, the only district outside the permissible range. *Voinovich v. Ferguson*, 586 N.E.2d 1020 (Ohio 1992). This decision interprets the constitution to permit the apportionment board to place the constitutional prohibition against dividing counties above the requirement that district populations fall within 5% of the ideal. The Ohio court explained that:

> leaving Senate District 32 underpopulated was unavoidable because irreconcilable conflicts with [the constitutional sections prohibiting the division of counties between senate districts] prevented adding population from adjacent territory. . . . When such provisions are irreconcilable, those public officials designated to apportion the state by Section 1 of Article XI have the duty to choose the proper course, and this court will not order them to correct one constitutional violation by committing another.

Id. at 1022. Since Ohio's highest court has found the district's population deviation authorized by the state constitution, we accept that determination. *Brown v. Ohio*, 432 U.S. 161, 167 (1977). At least where a district so created deviates by no more than 10% from the ideal, this interpretation of the Ohio Constitution reveals a man-

ner of advancing the state policy that is just as reasonable as the expanded population range that Article XI, Section 10 explicitly provides for whole-county house districts.

Despite our conclusion that Ohio's constitution reasonably advances the policy, we must further delve into the implementation of the discretion that the constitution gives the apportionment board. Plaintiffs argue that this *particular* plan inconsistently or arbitrarily advances the policy, and we must not casually dismiss this assertion. *See Roman v. Sincock*, 377 U.S. 695, 710 (1964) (rational factors applied in a manner "free from any taint of arbitrariness or discrimination"); *Brown*, 462 U.S. at 847; *Mahan*, 410 U.S. at 325. One way that plaintiffs may show arbitrariness is to prove that a plan could be produced that advances the policy just as well, but which creates a smaller total deviation. This is why the Court rejected Mississippi's county-line justification in *Connor v. Finch*, 431 U.S. at 420 ("[T]he plaintiffs in this case submitted to the District Court an alternative Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted and also came closer to achieving districts that are as nearly of equal population as is practicable.") (quotation omitted). In cases that reject districting plans, the Court has typically made reference to an alternative plan to show that the contested plan did not achieve the state's stated policy. *See Swann v. Adams*, 385 U.S. 440, 445 (1967) ("Florida could have come much closer to providing districts of equal population that it did" and still advanced its policy); *Kilgarlin v. Hill*, 386 U.S. 120, 124 (1967) (per curiam) ("[t]he District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds v. Sims*."); *cf. Mahan*, 410 U.S. at 326 (plan approved in part because "[t]here was uncontradicted evidence offered in the

District Court to the effect that the legislature's plan, subject to minor qualifications, produces the minimum deviation above and below the norm, keeping intact political boundaries. . . .").

Consistent with this case law, Plaintiffs focus their objections to the instant plan on the argument that it arbitrarily advances the defendants' stated policies. Having reviewed their specific objections, however, we find that they are inapposite. Plaintiffs' assertions of arbitrariness at best support the conclusion that Amendment D could have better effectuated certain districting goals, such as keeping townships in the same district, but these objections alone do not cast doubt on the state's advancement of its policy with respect to the whole-county districts that created the total deviation of greater than 10% here. Because the state policy at issue here is concerned narrowly with keeping together whole counties, and because the board has in fact preserved all whole counties within the applicable population limits, it cannot be said that the policy has been advanced arbitrarily.

The three state house districts that depart more than five percent from the ideal are whole counties. The state senate district that deviates more than five percent is, likewise, composed of two counties—no more, no less. Except for these whole-county districts, the plan's total deviation falls below the 10% threshold that is necessary for the plaintiffs to prove a *prima facie* case of population disparity. Thus, we find the deviations at issue here are the result of line-drawing that reasonably advances the rational state constitutional policy.

C. *Whether the total deviation exceeds constitutional limits.*

The final consideration to be addressed is whether the total deviations of 13.81% and 10.54% are constitutionally excessive. As the United States Supreme Court in *Brown* stated:

> Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds*' mandate of fair and effective representation if the population disparities are excessively high. "A State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality." *Mahan*[, 410 U.S. at 326].

Brown, 462 U.S. at 845; *cf. Reynolds*, 377 U.S. at 581 ("Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-protection principle in that legislative body."). In light of *Mahan*, the total deviations at issue in the instant case are not constitutionally excessive.

In *Mahan*, the Virginia legislature adopted an apportionment plan for state legislative districts that resulted in a total deviation of 16.4% with respect to the state house districts. As in the instant case, the justification offered for the deviation was the preservation of political subdivisions. The Supreme Court concluded:

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. *While this percentage may well approach tolerable limits, we do not believe it exceeds them.* Virginia has not sacrificed substantial equality to justifiable deviations.

Mahan, 410 U.S. at 329 (emphasis added).

Other state-districting cases in which the Court has found a violation concerned higher total deviations than *Mahan*. *See Reynolds*, 377 U.S. at 549 (500+% deviation) (approximate calculation from figures given); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 701-02 (1989) (78% deviation) (city districts); *Kilgarin*, 386 U.S. at 122 (26.48% deviation) (dicta); *Swann*, 385 U.S. at 442-43 (25.65% deviation); *Chapman*, 420 U.S. at 22 (20.14% deviation) (court-ordered plan); *Connor*, 431 U.S. 407 at 416-17 (19.3% house and 16.5% senate deviations). Likewise, deviations below the *Mahan* threshold have been found permissible. *See Abate*, 403 U.S. at 184 (11.9% deviation) (city boundaries); *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1255 (5th Cir.) (14% deviation) (city districts), *cert. dismissed*, 453 U.S. 946 (1981).

We can find no case holding that a total deviation—with respect to a legislative plan of apportionment of *state* legislative districts—of less than 16.4% is constitutionally excessive.[8] Thus, we hold that the total deviations of 13.81% and 10.54% are not excessive for purposes of the Equal Protection Clause of the Fourteenth Amendment. Under Ohio's constitutional scheme, it is possible that the preservation of whole-county districts could one day beget total deviations higher than those in Amend-

[8] We note that in *Brown*, the Court upheld a total deviation that was much higher than even that in *Mahan*, approving Wyoming's placement of a state representative in a sparsely populated county that created a total deviation of 89%. The Court carefully narrowed its holding to the particular fact situation, showing that the single representative did not greatly dilute the voting power of others in the state, since the *average* deviation between districts was 16%. 462 U.S. at 846-47. We also note that the Court has placed stricter limits on congressional reapportionment. In *Karcher v. Daggett*, 462 U.S. 725, 731-32 (1983), the Court struck down New Jersey's *congressional* reapportionment plan even though the deviation was a minuscule 0.6984%. In that case, the Court found the state's asserted justification was so empty that it did not even justify the small deviation at issue.

ment D—and in fact as high as 20%, if a county exists that is 10% below the ideal population and another county exists that is 10% above. We express no view today on whether such higher total deviations would be excessive, for we need only decide that those in this plan are not.

IV

In sum, we hold today that the Ohio reapportionment plan survives scrutiny under the one-person-one-vote guarantee of the Equal Protection Clause because (1) the defendants have advanced a genuine, rational state policy to justify the deviations from population equality among the state legislative districts; (2) their plan reasonably furthers the rational state policy; and (3) the 13.81% and 10.54% total deviations fall within constitutional limits. Accordingly, we enter judgment for the defendants on this issue.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

/s/ David D. Dowd
DAVID D. DOWD
U.S. District Judge

APPENDIX C

[Filed Mar. 31, 1994]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

BEFORE: JONES, Circuit Judge; CELEBREZZE, Senior Circuit Judge; and DOWD, District Judge.

NATHANIEL R. JONES, Circuit Judge. Before this court is the Motion of Plaintiffs for Leave to File a Second Amended Complaint. For the following reasons, the motion is granted.

I

This case is on remand from the United States Supreme Court, which, in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), resolved three issues concerning the defendants'

plan that reapportioned Ohio's state legislative districts pursuant to 1990 census data. First, the Court held that the plan does not violate the protection against race-based vote dilution in § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Id.* at 1154-58. Second, the Court held that the plan does not violate the Fifteenth Amendment to the Constitution. *Id.* at 1158. Third, the Court found that the plaintiffs had stated a *prima facie* case of population-based vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment, and instructed this court to further consider that issue. *Id.* at 1159. The court then remanded the case "for further proceedings in conformity with this opinion." *Id.* at 1159-60. We resolve the third issue in a separate opinion filed today.

Several months after its *Voinovich* decision, the Court decided the important districting case *Shaw v. Reno*, 113 S. Ct. 2816 (1993). *Shaw* held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects "an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." *Id.* at 2832. As the Court stated:

> Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

113 S. Ct. at 2832. In their initial submissions to this court on remand, the parties discussed *Shaw*'s applicability to this case, and in a December 22, 1993 Order we requested that the parties comment further on the applicability of *Shaw*. At this juncture, the plaintiffs submitted the instant motion to amend their complaint to plead the

Shaw issue, and they have filed a complaint that is amended accordingly. The defendants oppose this motion.

II

The plaintiffs' first amended complaint alleged that the apportionment plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution. 113 S. Ct. at 1153. As the Court described the allegations:

> According to the appellees, the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, appellees contended, minimized the total number of districts in which black voters could select their candidate of choice. In appellees' view, the plan should have created a larger number of "influence" districts —districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice.

Id. In the earlier proceedings before this panel, both parties produced volumes of information dealing with the boundaries, populations, and racial composition of Ohio's legislative districts. The parties explicitly raised the issue of racial gerrymandering, albeit in the context of alleging violations of the Fifteenth Amendment and the Voting Rights Act rather than of the Fourteenth Amendment. The issues tried thus included those implicated in *Shaw*. As the plaintiffs' claims are so closely related to the racial gerrymandering concerns in *Shaw*, we feel confident that had *Shaw* been decided before this case was initiated, the plaintiffs would have alleged a violation of the cause of action that that case establishes. Defendants argue that the Court's remand order and Federal Rule of Civil Procedure 15(b) prohibit us from allowing the plaintiffs to amend their complaint, but in fact both permit us to do so.

A. *The Scope of the Remand.* It is established law that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (quotation omitted) (citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). This is known as the "mandate rule." *See Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.) (under the "mandate rule," a district court on remand "may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court."), *cert. denied*, 113 S. Ct. 125 (1992).[1]

Under the mandate rule, we may not reconsider the issues decided by the Supreme Court, which are laid out above. This is the relevant point made by the cases, cited by the defendants, which hold that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). However, the case law nevertheless allows us to consider issues which have not been decided. In this case, the Court expressly abstained from passing upon the type of Equal Protection Clause issue discussed in *Shaw*, because plaintiffs did not plead it nor did this court reach it in its earlier decision:

> Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it

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[1] *See also Pan-Pacific Union*, 987 F.2d 594, 596 (9th Cir. 1993) ("The district court may not reconsider matters decided by us on the first appeal, but it may address any issue that we did not dispose of either expressly or impliedly."); *Hester v. International Union of Operating Engineers*, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991) (quotation omitted) ("Notwithstanding the law of the case doctrine, a district court on remand is free to address, as a matter of first impression, those issues not disposed of on appeal."); *Rutherford v. United States*, 806 F.2d 1455, 1459-60 (10th Cir. 1986); *Panama Processes v. Cities Service Co.*, 789 F.2d 991, 994 (2d Cir. 1986).

> here. Accordingly, we express no view on how such a claim might be evaluated.

113 S. Ct. at 1157. Thus, the Court's mandate does not prohibit us from considering that issue on remand.

The defendants stress that at one point in its opinion, the Court stated that it was remanding "only" for further proceedings on the population deviation issue. *Id.* at 1154. This statement, which comes at the end of the opinion's introductory section in which the Court summarizes the facts of the case, appears to indicate simply that the Court is remanding only the population claim and not the Voting Rights Act or Fifteenth Amendment ones. Though it is presumably within the Court's power to order us not to consider any other issues, this one-time use of the word "only" does not demonstrate that it meant to do so.

Because certiorari in *Shaw* had been granted before the Court's decision in this case, and because the oral argument in this case touched on the *Shaw* issue, the defendants also argue that it is meaningful that the Court could have discussed the *Shaw* issue but chose not to. However, these circumstances are irrelevant. The fact is that the Court did not expressly or impliedly resolve the issue that the plaintiffs' wish to allege, so we are not foreclosed from considering it.

B. *Federal Rule of Civil Procedure 15(b).* Rule 15 (b) allows an amendment of pleadings that is necessary to cause them to conform to the issues that have been tried. Moreover, the Rule instructs that a court "shall [allow an amendment] freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits." [2] The de-

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[2] Rule 15(b) provides:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of

fendants argue that it would be an abuse of discretion for this court to allow an amendment at this stage of the proceedings. They claim that it is well-established under *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1258-59 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2889 (1991), that it is an abuse of discretion for a court to amend a complaint late in the proceedings. However, *Prather* prohibited the amending of a complaint only because doing so in that case would be highly prejudicial to the defendant. Here, we do not think the defendants would be prejudiced by the amending. The following considerations assure us that justice demands that we allow the complaint to be amended.

First, the *Shaw* claim is closely linked to the earlier proceedings, such that the relevant facts have already been developed and the issues were in part explored in the earlier hearing.[3] The future litigation burden is correspondingly reduced, and this case involves competent attorneys on both sides who can easily make the adjustment to representing their clients with respect to the *Shaw* issue. Second, the contours of the cause of action established in *Shaw* were unclear until the issuance of the opin-

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the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not reflect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[3] In fact, the defendants' claim that the Supreme Court oral argument touched on the *Shaw* issue shows how closely linked the issues are.

ion in that case, so it is unfair for us to have expected the plaintiffs to have specifically articulated the issue earlier. Due to the closeness of the issues, we feel that the fact that *Shaw* had not yet been decided is the only reasonable explanation for why the plaintiffs did not make the specific claim previously. As just one example, the Plaintiffs' Proposed Findings of Fact, submitted prior to our earlier decision, contains a fourteen-page argument under the heading "1991 Plan Violates Ohio Constitution as a Result of Race Conscious Gerrymandering." R. —— at 114-28. We must assume that the plaintiffs would have alleged racial gerrymandering in violation of the Fourteenth Amendment as well, had such a cause of action been recognized.

If the plaintiffs have a meritorious constitutional claim here under *Shaw*, it would be unfair in the extreme for that challenge to go unheard simply because *Shaw* was decided after the complaint was filed. We therefore GRANT the plaintiffs' motion for leave to file a second amended complaint.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ Anthony J. Celebrezze
ANTHONY J. CELEBREZZE
Senior U.S. Circuit Judge

Dowd, Dissenting,

In my view, the recent decision of *Shaw v. Reno*, 113 S. Ct. 2816 (1993) dealing with Congressional redistricting for the State of North Carolina is anchored in a factual situation strikingly dissimilar to the reapportionment of Ohio for its General Assembly. As a consequence, I would deny the motion of the plaintiffs to file a second amended complaint. Accordingly, I respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISON

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE ANTHONY J. CELEBREZZE
JUDGE DAVID D. DOWD, JR.

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and

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and

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and

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and

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and

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and

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and

TYRONE RILEY
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and

WILLIAM L. MALLORY
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Plaintiffs,

vs.

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and

STANLEY J. ARONOFF
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and

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and

JAMES R. TILLING
The Ohio Senate
Statehouse
Columbus, Ohio 43266-0604,
Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs' Second Amended Complaint amends Plaintiffs' First Amended Complaint in only two respects. First, Count IV, entitled "Violation of the Equal Protection Clause—Segregation of Voters by Race Without Compelling Governmental Justification", is added. Second, the Prayer for Relief has been revised. Plaintiffs seek leave to file a Second Amended Complaint pursuant to a Motion of Plaintiffs for Leave to File a Second Amended Complaint, filed with the Court on January 14, 1994.

Plaintiffs themselves and for and on behalf of all persons similarly situated complain of Defendants, George V. Voinovich, Stanley J. Aronoff, Robert A. Taft, II, and James R. Tilling, official acts and allege as follows:

* * * *

VII. COUNT FOUR: VIOLATION OF THE EQUAL PROTECTION CLAUSE—SEGREGATION OF VOTERS BY RACE WTHOUT COMPELLING GOVERNMENTAL JUSTIFICATION

52. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the separation of voters by states solely on the basis of race where such separation cannot be justified by a compelling governmental interest. The reapportionment plan adopted by the Defendants on February 18, 1992 intentionally separated Ohio voters on the basis of race without regard for the traditional redistricting principles set forth in the Ohio Constitution and otherwise without any compelling governmental justification. To justify the creation of race-based districts in the urban centers of Ohio, Defendants asserted that there was widespread racial bloc voting throughout Ohio. The trial court specifically found, and the Supreme Court of the United States confirmed, that Ohio did not suffer from legally cognizable racially-polarized voting. *Voinovich v. Quilter,* —— U.S. ——, 113 S. Ct. 1149, 1159 (1993).

53. The Defendants deliberately created race-based legislative districts in urban centers initially and then using the purported, but sham, necessity of creating such districts as the basis for ignoring the traditional anti-gerrymandering provisions of the Ohio Constitution throughout the state of Ohio. Absent the ripple effect of the racial gerrymandering in the urban centers of the state of Ohio, the Defendants would not have been forced to ignore on a wholesale basis the directives of Article XI, Section 7, of the Ohio Constitution to follow existing political and legislative boundaries wherever possible.

54. Instead of advancing "a rational state policy of preserving county boundaries", *Voinovich v. Quilter,* 113 S. Ct. at 1159, the Defendants have selectivly chosen specific areas where they will honor county and other political boundaries, and other areas where they will abandon the

county, political, and legislative boundaries. The decision to abandon the traditional districting mandates contained within the Ohio Constitution is neither compelled by the doctrine of federal supremacy, nor based on any lawful, organized, or rational districting criteria. Defendants are without power to abandon the Ohio Constitution in the redistricting of the state.

55. The Defendants have articulated no compelling governmental interest for the wholesale abandonment of the provisions of the Ohio Constitution. As a result, the Defendants have drawn irregular districts in numerous places throughout the state, districts which have no explanation other than the ripple effects caused by the racially drawn districts in the urban centers. In some instances, the racially drawn districts themselves have irregular shapes not required by the Ohio Constitution.

56. The districts which have been modified solely on the basis of race include House Districts 31, 30, 22, 21, 38, 39, 44 and 49. No evidence has been presented to the trial court that either legally cognizable remedial action was necessary to draw these racially gerrymandered districts, or that the creation of such districts was narrowly tailored to further any compelling governmental need. In *Voinovich*, the Supreme Court eliminated compliance with the federal Voting Rights Act as a justification. In *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), the Supreme Court underscored the necessity for state officials to follow objective, rational policies such as those contained in the Ohio Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Enter judgment for Plaintiffs declaring and finding that (i) the plan adopted by the Board majority violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it segregates

voters by race without any compelling governmental justification and violates the Ohio Constitution; (ii) the plan adopted by the Board majority violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in that it violates the one-person, one-vote rulings of the United States Supreme Court; (iii) the federal Voting Rights Act, 42 U.S.C. § 1973, does not require the establishment of segregated voting districts in the absence of an evaluation and conclusion that 1981 districts drawn pursuant to the Ohio Constitution conflict with the requirements of the Act; (iv) the Defendants have improperly used the Voting Rights Act as an excuse to ignore Ohio Constitutional requirements to adopt a racially gerrymandered and partisan apportionment plan which intentionally packed, fragmented and segregated minority voters; and (v) under the doctrine of pendent jurisdiction, to declare that the adopted 1992 apportionment plan is invalid under Article XI of the Ohio Constitution;

(b) Determine that Plaintiffs designated as class representatives are appropriate class representatives for the allegations of the class set forth herein and certify such class as plaintiffs herein;

(c) Grant a permanent injunction that directs the Ohio Apportionment Board to reconfigure its 1992 Plan;

(d) Grant Plaintiffs their costs of the litigation, necessary expenses of the litigation, and reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1988 and 19731(e); and

(e) Award to Plaintiffs such other, further and necessary relief as the Court deems appropriate.

Respectfully submitted,

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APPENDIX E

IN THE SUPREME COURT OF OHIO

Case No. 91-1882

ORIGINAL ACTION

GEORGE V. VOINOVICH, *et al.*,
Plaintiffs,

VS.

THOMAS E. FERGUSON, *et al.*,
Defendants.

DEFENDANTS FERGUSON AND
QUILTER'S PREHEARING BRIEF

---

* * * *

B. *Fourteenth Amendment*

The Plaintiffs' unlawful, racially conscious activity described above in drawing and adopting the 1991 apportionment plan violates the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution has been used by the United States Supreme Court to strike down racially discriminatory restrictions on the right to vote. *See*, e.g. *Nixon v. Herndon*, 273 U.S. 536, 540-41, 47 S. Ct. 446, 446-47 (1927) in which the Supreme Court stated that the Fourteenth Amendment protects the right of citizens, regardless of race or color, to vote. *Accord*: *Neal v. Delaware*, 103 U.S. 370 (1881) where the Supreme Court of the United States held that

the legal effect of the adoption of the Fourteenth Amendment, and the laws passed for its enforcement, was to annul so much of existing state law as was inconsistent therewith, including provisions confining suffrage to whites. The deliberate dilution of voting strength of protected minorities by a law making body such as the Plaintiffs here in adopting a plan for redistricting is sufficient to violate the Equal Protection Clause of the Fourteenth Amendment. *See, Moore v. Brown*, 448 U.S. 1335, 101 S. Ct. 16, 17 (1980); *Lodge v. Buxton*, 639 F.2d 1358, 1362-63, 1375 (5th Cir. 1981), *aff'd sub num. Rogers v. Lodge*, 488 U.S. 613, 102 S. Ct. 3272 (1982); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984); *Stewart v. Waller*, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (per curiam); *Chapman v. Nicholson*, 579 F. Supp. 1504, 1507-08 (N.D. Ala. 1984).

Plaintiffs need not prove that the challenged action was motivated solely by the purpose to discriminate by diluting the voting strength of minorities. *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1105-06 (N.D. Ill. 1982)

The standards for determining a Fourteenth Amendment violation are the same as those for determining a Fifteenth Amendment violation. *Butts v. City of New York*, 779 F.2d 141, 143 n.1 (2d. Cir. 1985) *cert. denied*, 478 U.S. 1021, 106 S. Ct. 3335 (1986) (citing *Mobile v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497 (1980)). Thus, for the same reasons stated below with respect to the Fifteenth Amendment, Plaintiffs' activities violate the Fourteenth Amendment to the United States Constitution.

* * * *

Respectfully submitted,

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* * * *

APPENDIX F

STATUTORY PROVISIONS

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least

one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the atcion shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

APPENDIX G

No. ———

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

———

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

———

AFFIDAVIT

STATE OF OHIO:

ss:

COUNTY OF FRANKLIN:

Now comes John F. Bender, being first duly cautioned and sworn, says:

1. I am the Chief Elections Counsel to the Ohio Secretary of State, Robert A. Taft, II, who is a Petitioner in the above-captioned matter.

2. As Chief Elections Counsel to the Ohio Secretary of State, I am responsible for compliance with and enforcement of Ohio elections laws.

3. Partisan candidates for seats in the 121st Ohio General Assembly were required to file nominating petitions with the appropriate county boards of elections on or before February 17, 1994.

4. Two hundred ninety-two (292) individuals filed nominating petitions as partisan candidates for seats in the 121st Ohio General Assembly with the appropriate county boards of elections prior to the February 17, 1994, filing

deadline, and have been certified to the May 3, 1994, primary election ballot.

Further Affiant says not.

/s/ John F. Bender
JOHN F. BENDER

Sworn to and subscribed in my presence this 18th day of April, 1994.

/s/ Jean Maxwell
JEAN MAXWELL
Notary Public

[NOTARY SEAL]

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1647

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

STATEMENT OF CASE

Pursuant to Rule 24.2 of the Supreme Court Rules, Plaintiffs-Respondents state that Defendants-Petitioners have not set forth a statement of the case in their Petition for Writ of Mandamus ("Petition"), separately denominated as such, but that the following inaccuracies in the untitled preamble of the Petition and in Petitioners' "Statement of Facts" must necessarily be corrected.

First, Petitioners state at pages two and three of their Petition that District Court Judge Dowd "pointed out . . . in his dissent" below that there was "extraordinary hardship connected with further prolonging" the Ohio reapportionment case, and that Plaintiffs-Respondents' newly-asserted claim was "clearly frivolous." Petitioners provide no citation to the record for these statements because there is no record reference to support them. Judge Dowd's three-sentence dissent in the District Court does not contain the statements attributed to him by Petitioners, nor is that dissent fairly capable of being reasonably interpreted to imply such statements. Petition, Appendix C, p. 27a.

Second, the final footnote to Petitioners' "Statement of Facts" (Petition, p. 10, n.4) is not a factual statement at all but is, instead, an argument about malevolent motives the District Court allegedly had for stating its reasons for permitting the amendment which Petitioners now challenge. Claimed inconsistencies among the District Court's reasons for permitting the amendment plainly do not exist when the specific statements of those reasons are examined in context. Specifically, it is quite true that Plaintiffs' original claims below were closely related to the concerns in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), in that both cases involved constitutional redistricting challenges, with similar evidentiary arrays. However, it is also true that the *Shaw* issue is fundamentally different from the issues previously raised below because the close scrutiny standard to be applied to a race-based districting plan under the Equal Protection Clause of the Fourteenth Amendment (*i.e.*, a *Shaw*-like claim) is fundamentally different from the standard to be applied to a one-person one-vote claim under the Fourteenth Amendment, from the standard to be applied to a Fifteenth Amendment Claim of intentionally discriminatory vote dilution, and from the effects standard to be applied to a claim under § 2 of the Voting Rights Act, which the District Court previously addressed.

With the foregoing exceptions, and excepting Petitioners' penchant for historical irrelevancy in presenting its case for mandamus, Plaintiffs-Respondents are essentially satisfied with Defendants-Petitioners' statements about the recent occurrences in this case which prompted the filing of the Petition for Writ of Mandamus.

SUMMARY OF ARGUMENT

The District Court did not violate this Court's mandate in *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149 (1993), when it granted Plaintiffs-Respondents leave to amend their complaint to assert a claim of impermissible race-conscious redistricting, in violation of

the Fourteenth Amendment, pursuant to *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), as a challenge to the Ohio reapportionment plan. The *Shaw*-like claim was not among the matters decided by this Court in *Voinovich*—in fact, this Court expressly declined to make such a decision in *Voinovich*—and, in accordance with the so-called "mandate rule" typified by such cases as *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139 (1979) and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 59 S. Ct. 777 (1939), the District Court therefore could not have violated the *Voinovich* mandate when it allowed Respondents to assert that claim on remand.

Defendants-Petitioners have failed to make out a case warranting the issuance of the extraordinary writ of mandamus. The matter of amendments to pleadings is a matter committed to the discretion of the District Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 802 (1971). Petitioners have not shown any substantial prejudice, hardship or extraordinary circumstance which would support the requested relief of controlling the District Court's exercise of discretion, restraining it from proceeding on the amendment, and effectively directing the entry of judgment against the *Shaw*-like claim asserted by the amendment without any determination at any time about the merits of such a claim as a challenge to the Ohio reapportionment plan.

Finally, Petitioners are incorrect in suggesting that amendments to pleadings are implicitly prohibited on remand. Petitioners' case citations do not support such a *per se* prohibition, and there is ample Circuit Court authority supporting the propriety of amendments to pleadings on remand.

For these reasons, Petitioners' Petition for a Writ of Mandamus, directing the District Court to vacate its order granting Plaintiffs leave to amend their complaint, and directing the District Court to enter final judgment for Defendants, must be overruled.

ARGUMENT

I. INTRODUCTION

In *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149 (1993), this Court considered three claims and made three corresponding determinations: (1) this Court rejected Plaintiffs' claim and the District Court's conclusion that the Ohio reapportionment plan violated § 2 of the Voting Rights Act (*id.*, 113 S. Ct. at 1155-58); (2) this Court rejected Plaintiffs' claim and the District Court's conclusion that the Ohio reapportionment plan violated the Fifteenth Amendment to the United States Constitution by intentionally diluting minority voting strength (*id.*, 113 S. Ct. at 1158-59); and (3) this Court found that Plaintiffs had established a prima facie case of a violation of the Fourteenth Amendment to the United States Constitution because electoral districts under the Ohio reapportionment plan excessively deviated from one-person one-vote standards, and it remanded the case for further determination by the District Court as to whether those deviations were justified (*id.*, 113 S. Ct. at 1159-60).

In *Voinovich*, this Court did *not* consider or make any determination about any claim that the Ohio reapportionment plan violated the Fourteenth Amendment to the United States Constitution because it consciously separates voters by race, a claim which was first recognized by this Court in *Shaw v. Reno*, —— U.S. ——, 113 S. Ct. 2816 (1993), decided some three months after *Voinovich*. Indeed, in *Voinovich*, this Court explicitly noted that a race-conscious redistricting claim under the Fourteenth Amendment had not been presented by the parties or determined by the District Court, and this Court expressly disclaimed any opinion about the matter. *Voinovich*, —— U.S. at ——, 113 S. Ct. at 1157.

Upon remand, the District Court in *Voinovich* determined that the excessive deviations in Ohio's electoral district populations are justified, disposing of the last of

the three claims which had been considered by this Court in *Voinovich*. Ruling further, the District Court also granted leave for Plaintiffs to amend their complaint to assert a *Shaw*-like claim of impermissible race-based districting in violation of the Fourteenth Amendment, as a challenge to the Ohio plan.

Petitioners, herein, who are the Defendants in *Voinovich*, now ask this Court to issue the extraordinary writ of mandamus to restrain the District Court from proceeding on Plaintiffs' new claim of impermissible race-based redistricting, and to direct the District Court to enter final judgment in Defendants' favor. Defendants ask this Court to issue that extraordinary writ, and thereby to effectively enter a peremptory judgment against Plaintiffs on their newly-asserted *Shaw* claim, even though, as indicated above, neither this Court nor the District Court has ever made any determination about the merits of such a challenge to the Ohio reapportionment plan.

Remarkably, Petitioners' request for the issuance of that extraordinary writ, to accomplish that rather extraordinary end, is essentially based on nothing more than one word—"only"—which appears in the first part of this Court's opinion in *Voinovich*, and which Petitioners seize upon, out-of-context, to suggest that this Court intended in *Voinovich* to forever foreclose any consideration of any challenge to Ohio's reapportionment plan other than the matter of unequal district sizes. Apparently, Petitioners are of the view that this Court's use of the word "only" in the *Voinovich* opinion was intended to signal that Ohio's reapportionment scheme, alone among the fifty states, was to be exempt from the close scrutiny of race-based redistricting plans under the Fourteenth Amendment as subsequently recognized in *Shaw*; and that this Court's use of the word "only" in the *Voinovich* opinion was intended to signal such a remarkable exemption even though this Court explicitly disclaimed in the *Voinovich* opinion any view about the propriety of a *Shaw*-like challenge to the Ohio plan.

Petitioners' request for the extraordinary writ of mandamus is unwarranted and unsupported, and it must be rejected. As is shown in part II below, the District Court did not violate this Court's directions on remand when it granted leave for Plaintiffs to amend their complaint. On the contrary, the District Court's action was perfectly proper under the so-called "mandate rule," since the newly-asserted claim was not the subject of any determination made by this Court in *Voinovich*. In part III below, Respondents show that, in any event, Petitioners have failed to make the extraordinary showing required to obtain the interlocutory relief they seek to obtain by mandamus. Finally, in part IV below, Respondents also show that Petitioners' legal authority does not support Petitioners' suggestion, contrary to the "mandate rule," that pleadings cannot be amended on remand.

II. THE DISTRICT COURT ORDER GRANTING LEAVE TO AMEND TO ASSERT A *SHAW*-LIKE CLAIM DOES NOT VIOLATE THIS COURT'S REMAND ORDER IN *VOINOVICH*

The amendment of pleadings is within the sound discretion of the trial court, a point which the Petitioners must concede and have conceded. Petition for Writ of Mandamus ("Petition"), p. 17. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 802 (1971). Nevertheless, Petitioners would have this Court issue the extraordinary writ of mandamus, to restrain the District Court and effectively enter judgment against the claim asserted by amendment, in circumstances where this Court explicitly abstained from passing on the issue which is the subject of the amended pleading. To justify the issuance of the writ, Petitioners contend that the District Court has violated this Court's directive on remand.

Simply stated, if the claim raised by the amended pleading was not within the scope of the case when heard by this Court (a point again conceded by Petitioners,

Petition, p. 16), then it can hardly be said to have been within the scope of, and foreclosed by, this Court's mandate on remand. With respect to the Fourteenth Amendment issue discussed in *Shaw*, this Court stated in *Voinovich* (which was decided three months before *Shaw*):

> "Appellee's complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated."

Voinovich, —— U.S. at ——, 113 S. Ct. at 1157.

The statements by this Court that 1) "the District Court . . . did not address the issue," and 2) that the complaint did not allege the State's conscious use of race violates the Equal Protection Clause, and 3) that this Court expresses "no view on how such a claim might be evaluated," are dispositive of the Petitioners' argument that this Court's mandate foreclosed consideration of the issue raised by the amended pleading. *Id.* While the District Court may not reconsider issues decided by the Supreme Court, "on the remand a lower court is free as to other issues." *Quern v. Jordan*, 440 U.S. 332, 347, 99 S. Ct. 1139, 1148, n.18 (1979) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 781 (1939)).[1]

---

[1] Petitioners' argument, in a footnote to their Petition, that *Quern v. Jordan* is inapposite to the issue before this Court, is without merit. Like this case, the mandate considered in *Quern* remanded the case to the trial court " 'for further proceedings consistent with this opinion.' " *Id. See Voinovich*, —— U.S. at ——, 113 S. Ct. at 1159-60 (remanding "for further proceedings in conformity with this opinion.")

Petitioners are wrong in stating that *Quern* "merely concluded that the law of the case doctrine did not foreclose the lower court's considerations of issues left open by this Court's mandate." Petition, p. 13, n.5. In *Quern* the Court expressly considered the claim

Petitioners seek to counter the clear abstention statements of this Court by relying on another section of the *Voinovich* opinion for their view that this Court did not leave the *Shaw* issue open. Thus, Petitioners repeatedly cite the statement of this Court that it was remanding "only" for further proceedings on the population deviation issue. *Voinovich*, —— U.S. at ——, 113 S. Ct. at 1154. The District Court understood this to mean in context that this Court was simply indicating that it was remanding only one of the three claims considered, and that what was not being remanded were the Voting Rights Act claim and the Fifteenth Amendment claim. Logic and a full reading of the *Shaw* opinion compel that conclusion. As the District Court said, "[t]hough it is presumably within the Court's power to order us not to consider any other issues, this one time use of the word 'only' does not demonstrate that it meant to do so." Petition, Appendix C, p. 24a.

The so-called "mandate rule," announced in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168, 59 S. Ct. 777,

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that the District Court lacked power to order notice under the terms of this Court's remand stating that:

> "The simple answer to this contention is that we remanded the matter in *Edelman* 'for further proceedings consistent with this opinion,' and we hold today that the award of notice relief, as fashioned by the Court of Appeals, is not inconsistent with either the spirit or express terms of our decision in *Edelman*. 'While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.' "

Quern, 440 U.S. at 347, 99 S. Ct. at 1148 n.18 (quoting *Sprague*, 307 U.S. at 168, 59 S. Ct. at 781).

Moreover, in the same footnote, Petitioners mischaracterize *Jones v. Lewis*, 957 F.2d 260, 262 (6th Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 125 (1992), in arguing that the court in that case determined that its earlier mandate did not bar consideration of an issue because "this court made no determinations on the merits of [appellant's] case." Rather, that decision determining that the mandate did not preclude the consideration of an issue (consent to a search by police officers) turned on the fact that this issue "figures nowhere in the legal analysis of either the majority opinion or the dissent." *Id.*

781 (1939) and followed in *Quern, supra,* is clear that the principle applicable to such circumstances is the law of the case doctrine. "As with all applications of the law of the case doctrine, the trial court may consider those issues not decided expressly or impliedly by the appellate court or a previous trial court." *Jones v. Lewis,* 957 F.2d 260, 262 (6th Cir.), *cert. denied,* —— U.S. ——, 113 S. Ct. 125 (1992).

Under the mandate rule, upon remand the *Voinovich* District Court could not reconsider the allegations of violations of § 2 of the Voting Rights Act and the Fifteenth Amendment, the only claims actually resolved by this Court. Under the *Quern* doctrine, "on remand a lower court is free as to other issues." *Quern,* 440 U.S. at 347, 99 S. Ct. at 1148, n.18 (quoting *Sprague,* 307 U.S. at 168, 59 S. Ct. at 781).

Without articulating the argument explicitly, Petitioners appear to be deriving from this Court's use of the word "only" in the *Voinovich* opinion some application of a new form of *res judicata,* which would ascribe to the law of the case doctrine—concerning matters actually decided—the characteristics of merger and bar which might follow a final judgment. What is lacking here, however, is the final judgment. This Court has stated it as "familiar law that only a final judgment is *res judicata.*" *G. & C. Merriman Co. v. Saalfield,* 241 U.S. 22, 28, 36 S. Ct. 477, 480 (1916). Until there is a final judgment under the substantive and procedural law of the forum, the District Court's orders remain interlocutory and subject to modification at any time until entry of a judgment disposing of all of the rights and liabilities of the parties, except to the extent that this Court might explicitly determine and dispose of a particular issue upon an intervening appeal. As noted above, this Court explicitly declined to determine or dispose of the *Shaw* issue in this case. Accordingly, the District Court is not now foreclosed from considering it, and it does not violate this Court's instructions on remand in proceeding so to do.

III. PETITIONERS HAVE FAILED TO MAKE THE EXTRAORDINARY SHOWING REQUIRED TO SUPPORT THE ISSUANCE OF THE EXTRAORDINARY WRIT OF MANDAMUS

Petitioners concede that, "[o]rdinarily, the amendment of pleadings is a matter within the sound discretion of the trial court." Petition, p. 17. Nonetheless, Petitioners would have this Court issue the extraordinary writ of mandamus to control the District Court's exercise of discretion. Nowhere, however, do the Petitioners even remotely attempt to justify the use of the writ of mandamus except in connection with the arguments concerning the scope of the remand. That is to say, the remainder of the Petition is devoted to addressing Petitioners' differences with the District Court's exercise of discretion, and Petitioners' interest in controlling the District Court's discretion. The purpose of the writ "is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S. Ct. 269, 278 (1967) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148 (1953)).

An extraordinary writ, like a writ of mandamus, " 'may not be used to thwart the congressional policy against piecemeal appeals.' " *Will*, 389 U.S. at 104, 88 S. Ct. at 278 (quoting *Parr v. United States*, 351 U.S. 513, 520-21, 76 S. Ct. 912, 917 (1956)). The burden which the Petitioners must discharge is to show that appeal is an inadequate remedy because, as was stated in *Ex Parte Fahey*, 332 U.S. 258, 260, 67 S. Ct. 1558, 1559 (1947), "[t]hese remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal."

The Petitioners' argument that the District Court violated the scope of the mandate must be the cornerstone upon which they rest their motion because the issue of whether a three-judge panel should have permitted a com-

plaint to be amended is not an issue upon which this Court should grant mandamus. Rulings that are within the discretion of the trial court are not matters upon which a petitioner can show violation of a "clear and indisputable" right or "usurpation of power" by the trial court. Thus, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 191 (1980) (per curiam). *Accord: In re American Airlines, Inc.*, 972 F.2d 605, 609 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1262 (1993); *In re Bushkin Assoc., Inc.*, 864 F.2d 241, 245 (1st Cir. 1989); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984); *Delano v. Kitch*, 663 F.2d 990, 1002 (10th Cir. 1981), *cert. denied*, 456 U.S. 946, 102 S. Ct. 2012 (1982). It is clear that the party seeking mandamus "has 'the burden of showing that its right to issuance of the writ is "clear and undisputable." ' " *Will*, 389 U.S. at 96, 88 S. Ct. at 274 (quoting *Bankers Life*, 346 U.S. at 384, 74 S. Ct. at 148).

This Court has repeatedly stated its views concerning the severity of the standard to be applied to petitions for the writ of mandamus. Petitions for writ of mandamus in the Supreme Court are subject to a "stringent standard." *Gulf Stream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 108 S. Ct. 1133, 1144 (1988). "This Court has repeatedly observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Id.*, 108 S. Ct. at 1143. *Accord: Kerr v. United States Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402, 96 S. Ct. 2119, 2123 (1976) ("the remedy of mandamus is a drastic one to be invoked only in extraordinary situations"); *Allied Chem. Corp.*, 449 U.S. at 34, 101 S. Ct. at 190. "The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.' " *Will*, 389 U.S. at 107, 88

S. Ct. at 280 (quoting *Ex Parte Fahey*, 332 U.S. at 260, 67 S. Ct. at 1559). Mandamus, it must be remembered, does "not run the gauntlet of reversible errors." *Bankers Life*, 346 U.S. at 382, 74 S. Ct. at 147.

In addition, as stated in *Will v. United States*, the basis for issuing the writ of mandamus is to protect appellate *jurisdiction*. Nothing is more fundamental in Supreme Court jurisprudence than that this Court's *original* jurisdiction is narrowly circumscribed by the text of Article III, Section 2 of the Constitution, which, as held in *Marbury v. Madison*, 5 U.S. 137 (1803), does not permit this Court to hear original actions in mandamus. Under *Marbury v. Madison*, this Court's "statutory authority to issue writs of prohibition or mandamus to district courts can be constitutionally exercised only insofar as such writs are *in aid* of its *appellate* jurisdiction." *Ex Parte Republic of Peru*, 318 U.S. 578, 582, 63 S. Ct. 793, 796 (1943) (emphasis added). This narrow basis for mandamus in this Court is reflected in the language of the All Writs Act, 28 U.S.C. § 1651(a), which states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis added.) Thus, the mandamus inquiry is limited to either "confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so." *Ex Parte Republic of Peru*, 318 U.S. at 583, 63 S. Ct. at 796-97, not sitting as a super trial court to review discretionary rulings piecemeal.

The issue of the propriety of the amendment, then, for purposes of *this* petition for the extraordinary writ of mandamus, is confined solely to the question of whether the amendment "clear[ly] and indisputabl[y]" violated this Court's mandate. As demonstrated above, the District Court's decision plainly did not violate this Court's mandate, and Petitioners have failed to make any showing to the contrary.

Nonetheless, even if it were assumed, solely for the sake of argument, that deviation from this Court's mandate was established, Petitioners would still have failed to establish the kind of exceptional prejudice, hardship, or extraordinary circumstance, that would warrant the issuance of the extraordinary writ. In this regard, on the merits of the issue of whether the motion to amend properly should have been granted, the District Court found that "[i]f the plaintiffs have a meritorious constitutional claim here under *Shaw*, it would be unfair in the extreme for that challenge to go unheard simply because *Shaw* was decided after the complaint was filed." Petition, Appendix C, p. 26a. With respect to the argument that Plaintiffs should have included the *Shaw* issue in their complaint, the District Court noted that:

> "*Shaw* held for the first time that a plaintiff can state a claim under the Equal Protection Clause by alleging that a districting plan reflects 'an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.' . . . As the [Supreme] Court stated:
>
> > 'Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.' "

Id. at 21a (citation omitted).

With respect to the Petitioners' assertions of "hardship" in allowing the amendment, the District Court observed that the matters relating to a *Shaw*-like claim were so clearly linked in the earlier proceedings, "that the relevant facts have already been developed and the issues were in part explored in the earlier hearing. The future litiga-

tion burden is correspondingly reduced, and this case involves competent attorneys on both sides who can easily make the adjustment to representing their clients with respect to the [newly-asserted] *Shaw* issue." *Id.* at p. 25a.

Finally, with respect to the matter of prejudice, Petitioners themselves define the operative consideration in this case as essentially being nothing more than "doubt" about the validity of Ohio's reapportionment plan. Petition, p. 20. In fact, Petitioners expressly seek the extraordinary writ of mandamus for no apparent reason other than to "erase that doubt." *Id.*

However, "doubt" about the validity of the plan under *Shaw*, as raised by the amended pleading, hardly constitutes extraordinary prejudice warranting the issuance of the extraordinary writ of mandamus. Indeed, if it would be considered to be prejudice of this character, then one would expect this Court to issue writs of mandamus directing the dismissal of any new and separate lawsuit which might be commenced to challenge the Ohio reapportionment plan under *Shaw*, because such independent litigation also would raise "doubt" about the plan.

The extraordinary writ of mandamus obviously is not intended to be issued to control a new claim which raises a previously unresolved issue of federal constitutional law —whether that new claim is raised in a pending lawsuit or in a new lawsuit. The alleged prejudice of "doubt" that flows from examination of a new claim in a lawsuit is ordinary, and is not sufficient grounds for issuing the extraordinary writ.

IV. PETITIONERS' LEGAL AUTHORITY DOES NOT SUPPORT THE SUGGESTION, CONTRARY TO THE "MANDATE RULE," THAT PLEADING AMENDMENTS ARE PROHIBITED ON REMAND

Petitioners essentially suggest (Petition, pp. 17-18) that there is an implicit, absolute bar to the amendment of pleadings on remand. Not only is this suggestion contrary

to the "mandate rule" previously discussed, but it is not supported by the case law cited by Petitioners.

Petitioners' reliance upon *Worley v. Columbia Gas of Kentucky, Inc.*, 491 F.2d 256, 265 (6th Cir. 1973), *cert. denied*, 417 U.S. 970, 94 S. Ct. 3174 (1974)—that there is such an absolute bar to an amendment of a complaint after remand, where the amendment raises issues not within the theory on which the case was tried—is without merit. The *Worley* case is distinguishable from the instant case because in *Worley* the judgment of the district court was reversed and the case was remanded with instructions to dismiss the case. Thus, in *Worley* the appellate opinion made a final disposition of the case.

Likewise, *United States ex rel. Townsend v. Oglivie*, 360 F.2d 925, 925-26 (7th Cir.), *cert. denied*, 385 U.S. 938, 87 S. Ct. 304 (1966), involved a mandate of the appellate court directing the district court to dismiss the petition. Further, *Equitable Life Assurance Soc'y v. Mercantile-Commerce Bank & Trust Co.*, 155 F.2d 776, 779 (8th Cir.), *cert. denied*, 329 U.S. 760, 67 S. Ct. 114 (1946), cited by Petitioners (Petition, pp. 17-18), does not support the proposition that there is an inflexible rule barring amendments to pleadings after remand. Rather, in that case, leave to amend an answer on remand to assert an additional defense was denied primarily because the additional defense of abandonment had previously been tried and resolved against the defendant at trial as a part of the trial court's determination of defenses of waiver, estoppel and laches. *Equitable Life*, 155 F.2d at 779. Where, as here, the appellate court did not issue a mandate ordering a final disposition of the case, the District Court on remand is not barred from granting leave to amend a complaint to add a new issue.

Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), is equally not on point. That case involved the issue as to whether a district court, in a preliminary injunction hearing which allegedly decided unpleaded claims without

the consent of one of the parties, acted unfairly. It does not support the proposition that on remand the District Court is absolutely barred from considering issues not resolved by the appellate court. Finally, *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 662 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135, 99 S. Ct. 1058 (1979) is distinguishable because in that case the appellate court specifically directed the trial court to consider a motion to amend the complaint. It does not support the proposition urged by Petitioners that leave to amend may never be granted after remand.

The fact is that federal courts do permit amendments on remand to add new issues. *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.) ("[a]n amendment can be proper after remand to the district court even if the claim was presented for the first time on appeal or had not been presented to the district court in a timely fashion"), *cert. denied*, 464 U.S. 893, 104 S. Ct. 238 (1983); *Ward Petroleum Corp. v. Federal Deposit Ins. Corp.*, 903 F.2d 1297, 1301 (10th Cir. 1990) ("on remand the district court may allow defendants to amend their pleadings if 'justice so requires,' " to add an affirmative defense not previously asserted in the trial court) (quoting Fed. R. Civ. P. 15(a)); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1125 (8th Cir. 1985) (" '[a]n amendment can be proper after remand to the district court even if the claim . . . had not been presented to the district court in a timely fashion' ") (quoting *City of Columbia*, 707 F.2d at 341 (citations omitted)), *cert. denied*, 475 U.S 1046, 106 S. Ct. 1263 (1986).[2]

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[2] The case of *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 970 (6th Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S. Ct. 1942 (1974), cited by Petitioners (Petition, p. 18 n.10) does not establish an absolute prohibition against granting leave to amend a complaint after remand to raise a new issue which was not expressly the subject of a remand order. The court in *Troxel* did not announce an inflexible rule against amendments of pleadings after remand, but recognized that the decision to grant or deny a motion for leave to amend after remand is within the sound discretion of the

Accordingly, this Court's mandate in *Voinovich* does not bar the granting of Respondents' motion to file a Second Amended Complaint to assert a claim (not addressed on appeal) that the State's conscious use of race in redistricting violates the Fourteenth Amendment.

CONCLUSION

For all of the foregoing reasons, this Court must overrule Petitioners' Petition for a Writ of Mandamus, and the District Court should be permitted to proceed, undisturbed, to consider Plaintiffs' *Shaw*-like challenge to Ohio's reapportionment plan as being violative of the Fourteenth Amendment because it constitutes impermissible race-conscious redistricting.

Respectfully submitted,

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district court and will be reversed only for an abuse of discretion. Likewise, *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2889 (1991), cited by Petitioners (Petition, p. 17), recognized that the decision to permit amendments to pleadings after remand lies within the sound discretion of the trial court subject to the abuse of discretion standard of review.

Supreme Court, U.S.
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(3)

No. 93-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

In re: GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Petitioners.

PETITIONERS' REPLY TO PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

Petitioners George V. Voinovich, Governor of the State of Ohio, Robert A. Taft II, Secretary of State of Ohio, Stanley J. Aronoff, President of the Ohio Senate, and James R. Tilling, Secretary to the Apportioning Persons (collectively, "Petitioners"), petitioned this Court to issue a writ of mandamus. The Petition asked this Court to require the United States District Court for the Northern District of Ohio to comply with the mandate of this Court issued in the case of *Voinovich v. Quilter*, October Term, 1992, on March 2, 1993, and to confine its proceedings on remand to Plaintiffs-Respondents' "one person, one vote" claim as instructed in this Court's opinion. On May 23, 1994, Plaintiffs-Respondents filed a Brief in Opposition to that Petition in which they attempted to characterize the Petition merely as an attempt to interfere with the District Court's discretion in granting a motion to amend the pleadings. Because this is a complete mischaracterization of the relief requested, Petitioners file this short reply.

REASONS FOR GRANTING THE WRIT

THE DISTRICT COURT, TO THE SUBSTANTIAL PREJUDICE OF PETITIONERS, EXCEEDED THE SCOPE OF THIS COURT'S REMAND IN *VOINOVICH v. QUILTER*, 113 S.CT. 1149 (1993), AND PETITIONERS ARE, THEREFORE, ENTITLED TO A WRIT OF MANDAMUS.

1. In their Brief in Opposition, Respondents acknowledge that they did not raise a Fourteenth Amendment racial gerrymandering claim in the District Court until well after this Court's decision in this case, see Brief in Opposition at 4, and that all of the issues they did raise have now been resolved in favor of the Petitioners, see Brief in Opposition at 4-5. Respondents have, in effect, conceded that *this case* is over. Petitioners have simply asked this Court to declare just that.

2. Respondents also suggest that the Petitioners have asked this Court to declare that "Ohio's reapportionment scheme, alone among the fifty states, was to be exempt from the close scrutiny of race-based redistricting plans under the Fourteenth Amendment . . . ." Brief in Opposition at 5. Petitioners, however, have not requested any such relief. Rather, Petitioners have simply asked this Court to enforce its mandate issued in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993), to prohibit *these Plaintiffs, in this case,* from beginning anew their attack on the Ohio reapportionment plan.

3. In their Brief in Opposition, Respondents echoed the District Court's sentiments that it would be "unfair" to foreclose the lower court's consideration of their claim under *Shaw v. Reno,* 113 S.Ct. 2816 (1993), when that case was not decided until after this Court had issued its decision in this case. See Brief in Opposition at 13. It must be remembered, however, that the claim of race-based gerrymandering in violation of the Fourteenth Amendment was not new to the Respondents when this Court

issued its decision in *Shaw*. Indeed, the Respondents asserted such a claim in *December, 1991*, in the brief they filed with the Ohio Supreme Court in the case of *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See Petition at 36a-38a. For whatever reason, they consciously chose not to assert such a claim *in this case* until after this Court issued its decision reversing the District Court's decision on all of their other claims.[1]

Furthermore, as noted above, this Court's issuance of a writ of mandamus ordering the District Court to comply with the mandate in *Voinovich v. Quilter, supra*, would not, as suggested by Respondents, completely foreclose a district court's future consideration of a properly asserted *Shaw*-like claim. It would simply prohibit *these Plaintiffs* from prolonging *this litigation* in contravention of this Court's mandate.

4. Respondents have disputed the applicability of a number of the cases cited by Petitioners. Because Petitioners can discern no value in further discussing the interpretation of these decisions, Petitioners rest upon the discussion of these cases contained in the Petition.

Significantly, however, the Respondents did not even cite this Court's decision in *United States v. Haley*, 371 U.S. 18 (1962), the case most analogous to the issue presented by the Petition herein. The Court in *Haley*, like the Court in *Voinovich v. Quilter*, reversed the district court, leaving only one issue for the district court's consideration on remand. The district court, however, went beyond the scope of the Court's remand and adjudicated other issues. On consideration of a motion for leave to file a petition for a writ of mandamus, this Court in *Haley* concluded that "[t]he District Court's error should be rectified without delay, and we think that

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[1] Under Respondents' logic, the issues in *Shaw* would have never been presented to this Court because no plaintiff could be expected to assert a novel claim unless and until this Court has issued a decision in which it stated that such a claim exists.

the proper means for accomplishing this is by mandamus." 371 U.S. at 20 (citations omitted).[2]

5. Respondents argue that the Petitioners' request for the issuance of a writ of mandamus is based solely upon this Court's use of the word "only" in the first part of its opinion in *Voinovich v. Quilter*. Although the Petitioners do rely upon this Court's use of the word "only," the scope of the Petition is clearly broader.

Petitioners submit that this Court's use of the word "only" in its opinion, at the close of a detailed overview of the comprehensive litigation concerning the validity of the Ohio reapportionment plan, was not inadvertent. The Court, being fully aware of the history of this case as well as the issues raised in *Shaw* at the time it issued its unanimous decision in this case, deliberately inserted the word to ensure that *this challenge* to the Ohio reapportionment plan would come to a close. The District Court's decision at issue herein has totally eviscerated this Court's use of the word.

6. Finally, Respondents argue that Petitioners have failed to establish the prerequisites to this Court's issuance of a writ of mandamus. Specifically Respondents assert that Petitioners' claim of "hardship" does not rise to the level of "extraordinary circumstances" warranting the issuance of the writ. This Court, however, has on numerous occasions stressed that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993) (citation omitted). See also *Voinovich*, 113 S.Ct. at 1156-57. The decision of the District Court at issue herein is, in effect, an extension of the lower court's retention of jurisdiction as some sort of "super apportionment board" to rule on

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[2] Nor do Respondents cite *Gaines v. Caldwell*, 148 U.S. 228 (1893), in which the Court concluded that its mandate was enforceable through the issuance of a writ of mandamus, and that its mandate was not affected by its subsequent decisions. 148 U.S. at 238, 244.

all aspects of the Ohio reapportionment. This is precisely the type of federal court interference this Court cautioned against in *Growe*.

Not only have Defendants [Petitioners here] been prejudiced by this interference, but 292 candidates who filed petitions to run for seats in the General Assembly prior to the February 17, 1994, deadline, and all the voters of Ohio have been prejudiced by once again leaving in doubt the validity of the plan of apportionment for the General Assembly. Surely, the prolonged continuation of the cloud hanging over Ohio's reapportionment plan constitutes the "extraordinary" circumstances which require this Court to enforce its mandate in *Voinovich v. Quilter, supra.*

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to issue a writ of mandamus to the Judges-Respondents directing them to vacate their Opinion and Order of March 31, 1994, granting Planitiffs' motion to file a second amended complaint and to confine their proceedings on remand to the Plaintiffs-Respondents' "one person, one vote" claim is instructed in this Court's opinion in *Voinovich v. Quilter,* 113 S.Ct. 1149 (1993). Because the District Court has now resolved that claim in favor of the Defendants-Petitioners, this Court should further direct the District Court to enter judgment in favor of the Defendants-Petitioners.

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